

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Levaquin Products
Liability Litigation, File No. 08-md-1943
(JRT/AJB)

Minneapolis, Minnesota
April 4, 2012
4:19 P.M.

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

For the Plaintiffs: **CHARLES ZIMMERMAN, ESQ.**
RONALD S. GOLDSER, ESQ.
LEWIS J. SAUL, ESQ.
KEVIN FITZGERALD, ESQ.
COREY SULLIVAN, ESQ.
JOSEPH SOFFEY, ESQ. (Via phone)

For the Defendants: **JAMES IRWIN, ESQ. (Via phone)**
TRACY J. VAN STEENBURGH, ESQ.
WILLIAM ESSIG, ESQ. (Via phone)
JOHN WINTER, ESQ.

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transcript produced by computer.

KRISTINE MOUSSEAU, CRR-RPR
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1 4:19 P.M.

2 (In open court.)

3 THE COURT: You may be seated. Good afternoon,
4 everyone. This is In Re: Levaquin Products Liability
5 Litigation, Multi District Litigation Number 08-1943.

6 Counsel, let's note appearances, first for the
7 plaintiffs.

8 MR. GOLDSER: Good afternoon, Your Honor. Ron
9 Goldser for plaintiffs.

10 THE COURT: Mr. Goldser.

11 MR. SAUL: Good afternoon, Your Honor. Lewis
12 Saul for plaintiffs.

13 THE COURT: Mr. Saul.

14 MR. SOFFEY: Joseph Soffey for Wendy Bouse.

15 THE COURT: Good afternoon.

16 MR. ZIMMERMAN: Good afternoon, Your Honor.
17 Bucky Zimmerman for plaintiffs.

18 THE COURT: Mr. Zimmerman, good afternoon.

19 MR. SULLIVAN: Good afternoon, Your Honor. Corey
20 Sullivan for plaintiffs.

21 MR. FITZGERALD: Good afternoon, Your Honor.
22 Kevin Fitzgerald for plaintiffs.

23 THE COURT: Very well. For the defense?

24 MS. VAN STEENBURGH: Hello, Your Honor. Tracy
25 Van Steenburgh for defendants.

1 MR. WINTER: Good afternoon, Your Honor. John
2 Winter for defendants.

3 THE COURT: Anyone else on the phone?

4 MR. SOFFEY: Yes. Attorney for Wendy Bouse,
5 Joseph Soffey.

6 THE COURT: Okay. Very well. Anyone else on the
7 phone?

8 MR. ESSIG: Good afternoon, Your Honor. Bill
9 Essig for defendants.

10 THE COURT: Good afternoon, Mr. Essig.

11 MR. GOLDSER: Mr. Irwin was on the line.

12 THE COURT: Do we have Mr. Irwin on the line? I
13 guess not.

14 MR. GOLDSER: I heard somebody ring off, and we
15 had heard a dog barking. Perhaps he needed to let his dog
16 out.

17 THE COURT: Maybe. Maybe he's on his way back.
18 Sometimes you get knocked off the phone, and you have to
19 call back in.

20 Go ahead, Mr. Goldser.

21 MR. GOLDSER: I believe Your Honor should have an
22 agenda.

23 THE COURT: I do.

24 MR. GOLDSER: And with the Court's permission,
25 since we spent all day with Magistrate Judge Boylan, we

1 thought we might take the last item, the settlement
2 conference, out of turn and report on that first. It will
3 give you context I think for the rest of the agenda, and
4 Mr. Zimmerman will report on that.

5 THE COURT: Okay. Very well.

6 Mr. Zimmerman?

7 MR. ZIMMERMAN: Good afternoon.

8 THE COURT: Good afternoon.

9 MR. ZIMMERMAN: We have miles to go, but the
10 march has begun I guess is the best we can capture things.
11 We have been working in earnest for some time trying to get
12 to a place of agreement. We're not there. We're going to
13 be back tomorrow. Lots of things are being discussed.

14 Nothing has been resolved, but I think we're all
15 committed to trying to see if we can get there. If we can,
16 it will be helpful to the rest of the agenda because some
17 of the things that are on the agenda won't have to be dealt
18 with by the Court.

19 If we can't, obviously we'll be back. I don't
20 want to paint it any other way. I don't want to prejudge
21 anything, but we're working hard, and we're under excellent
22 guidance with Judge Boylan, and I think we're all working
23 in good faith.

24 THE COURT: Okay. Is there further meetings
25 scheduled?

1 MR. ZIMMERMAN: Yes. We are to meet again
2 tomorrow at 8:00 a.m., and after that, that's the only
3 thing that is scheduled. We were there all day today. We
4 have met privately several times in our respective law
5 offices, and we have been exchanging lots of information
6 through e-mails and the mail.

7 THE COURT: Okay.

8 MR. ZIMMERMAN: So that's really as best I can
9 give it. I don't want to put any more spin on it than
10 that, if I don't have to.

11 THE COURT: All right. Thanks.

12 Do you want to add anything, Ms. Van Steenburgh?

13 MS. VAN STEENBURGH: No, Your Honor. That's it.

14 THE COURT: Mr. Goldser?

15 MR. GOLDSER: Okay. And then of course the other
16 track that we need to pursue is the litigation track, and
17 they're going on simultaneously. The number of cases in
18 federal and state court, I presume Mr. Essig would have a
19 report for us on that?

20 THE COURT: Ms. Van Steenburgh, do you have it?

21 MS. VAN STEENBURGH: Either one. Mr. Essig and I
22 have been in communication so --

23 THE COURT: Go ahead.

24 MS. VAN STEENBURGH: There are 1774 filed cases
25 in the MDL. There are seven non New Jersey cases.

1 Elsewhere, I don't know what states they're in. Mr. Essig
2 might be able to fill us in on that, and then there are
3 1919 cases in New Jersey that have been filed as of, this
4 is all as of April 4th, and I believe the next conference
5 in New Jersey is either the 23rd or 25th of April, but
6 nothing is going on there right now at all.

7 THE COURT: The 23rd?

8 MS. VAN STEENBURGH: Either the 23rd or 25th.
9 I'm not sure which it is, but nothing has been going on,
10 and that will be the first status conference since the
11 trial, I believe.

12 THE COURT: Okay. So they don't have another
13 trial scheduled at this point?

14 MS. VAN STEENBURGH: They do not at this point.

15 THE COURT: Okay. Thank you.

16 MR. GOLDSER: And the Court should know that
17 there are also settlement negotiations going on in the New
18 Jersey cases at the same time, and we don't have any
19 particular details on that. We just know that they're
20 occurring.

21 I know Judge Higbee has had a number of trials in
22 other matters, and some of the status conferences have been
23 derailed that were previously scheduled. So hopefully this
24 one will go forward, and they, too, will continue the
25 litigation track.

1 As to the filed cases in various courts, I know
2 one of the things that we have been talking about in our
3 exchange of information in the settlement context is the
4 existence of unfiled cases, and one of the things that we
5 have observed, particularly through our office, is that
6 there are a number of cases that remain unfiled where the
7 statutes of limitations clearly are still viable.

8 A Minnesota case where the prescription happened
9 right before the black box warning in 2008 would not expire
10 for another couple of years yet. There is some Missouri
11 and Florida cases where there are four- and five-year
12 statutes that have not expired. So, you know, if we do not
13 reach resolution, there will be some more cases that will
14 get filed with viable statutes. So we're not done yet in
15 terms of the overall inventory in federal court.

16 My impression is that for the most part the state
17 court cases have been filed, because those are two-year
18 statutes. There is a discovery rule I believe in New
19 Jersey, but for the most part, I think those will all have
20 been filed. I can't say that there are a lot more federal
21 cases that remain to be filed, but certainly there are
22 still some viable statutes that are out there.

23 THE COURT: Under 50, you think?

24 MR. GOLDSER: It's hard to know. I mean, in our
25 office at one point we had pegged about 50 cases that were

1 unfiled, but not all of those have clearly viable statutes,
2 although, you know, the discovery rule from state to state
3 we would have some arguments about some statute of
4 limitations issues on a number of cases that we have been
5 kicking around that have been filed or that would be filed.

6 So that issue is kind of percolating out there as
7 well and may or may not be resolved at some point. We have
8 sort of combined items one and two on the agenda, both in
9 terms of number of cases filed and status in New Jersey.
10 Mr. Sullivan from John Carey's office is involved in the
11 Illinois cases, and I know they have a trial coming up in
12 September, and I thought I would defer to Mr. Sullivan, and
13 he can tell you the status of that.

14 THE COURT: Very well. Mr. Sullivan?

15 MR. SULLIVAN: Good afternoon, Your Honor. In
16 Illinois state court in St. Claire County, Illinois, we
17 have two cases that have been consolidated for discovery
18 purposes. So far on those cases, the plaintiff treater,
19 prescriber and plaintiff case specific expert depositions,
20 those have all been done, and like Ron said, the trial date
21 is September 10th of this year.

22 THE COURT: That's St. Claire County, did you
23 say?

24 MR. SULLIVAN: Yes. St. Claire County and Judge
25 Cueto.

1 THE COURT: Two cases consolidated? Two
2 plaintiffs consolidated?

3 MR. SULLIVAN: Correct.

4 THE COURT: Okay. Very well.

5 MR. SULLIVAN: Thank you.

6 MR. GOLDSER: Of course, those cases are through
7 Mr. Carey's office. Mr. Carey is on the MDL PSC, and it's
8 our understanding that much of the evidence that has been
9 developed here in the MDL will be available and used and
10 include some or all of the experts in that case. So it
11 would not be too hard to put the generic case together for
12 that trial.

13 The next item on the agenda is entitled Proposed
14 Pretrial Order 13 Conditions Precedent to Remand. Really
15 the litigation track in this court is, what are we doing
16 about a remand plan, and we have had some conversations
17 about that, albeit our focus has been more on exchange of
18 information in the settlement context.

19 The items that are listed here as sub items, I'm
20 not sure it makes sense to go through them all in any great
21 detail here today. They are the issues that we've
22 identified as things that we need to talk about and have
23 resolved before we have a formal remand program. We've
24 identified them for the defense.

25 We need to have further conversation for the meet

1 and confer to work out some of the details. A couple
2 things, though, I would like to call to the Court's
3 attention. Most prominently are the first and the last,
4 the last being the Court of Appeals decision in the Schedin
5 matter.

6 We do not yet have oral argument scheduled. The
7 briefing is complete, and what the appellate court does in
8 Schedin will have an obvious bearing on how we go forward,
9 both in this court and probably in remand. So it would
10 seem to me that as we try to craft a remand order -- and we
11 have started to do that.

12 You know, many of these remand orders have a
13 distinction of the rulings in the MDL courts so that the
14 transferor court can have the basis of the experience that
15 we've had and the like, and, you know, it would be easy to
16 go and summarize the rulings that Your Honor has made, but
17 if the Eighth Circuit takes a different view of that, which
18 obviously we don't think they will, but, you know, if they
19 do, then all of that work would be for naught.

20 So it seems to me that the appellate decision in
21 Schedin, if we get that far, will be kind of a necessary
22 condition precedent to getting a remand program in place.

23 The other matter is the first one, the proposed
24 assessment order, the amendment to pretrial order number 3.
25 We submitted that proposed order yesterday afternoon on

1 ECF. It is a proposed order. I think Your Honor received
2 the letter from the New Jersey liaison counsel, Mr. Meadow
3 and Mr. London today.

4 We have had some brief communication with them.
5 They have asked us to request that the Court hold off
6 entering pretrial order number 3 until we have some
7 conversation with them. We don't know what issues they
8 have to raise. Hopefully whatever issues they have to
9 raise we can work out with them, but if not, then I think
10 it would be incumbent upon us to set a date for objections
11 to be filed, if there are any, to pretrial order number 3,
12 and then if necessary replies and a hearing.

13 So while we can certainly have those
14 conversations and intend to do so immediately, I guess our
15 request is that while we don't think it's appropriate to
16 enter an amended order today that we do think it's
17 appropriate to set a schedule for objections to be filed so
18 that if there are any, we know what they are and from whom
19 they come and that we can address them at this point in
20 time.

21 With, you know, the negotiations going on, both
22 in this court and in the New Jersey court, the current
23 provisions of pretrial order 3 have a requirement that any
24 settlements be disclosed to the Court and that the Court
25 can then rule upon whether or not any of those settlements

1 are within the jurisdiction of this Court for assessment
2 purposes.

3 We certainly would expect all parties to honor
4 that and disbursements of money not occur until any issue
5 about assessments is resolved. You know, I would hate to
6 see the money flow and then we would have to do a call-back
7 of some kind. I don't think that's the intent.

8 I don't think anybody would do that, but that
9 certainly is the way I understand the current order, but
10 we're happy to get this issue of the amendment to the
11 assessment worked out promptly and hopefully with an
12 agreement, at least amongst all the people on the
13 plaintiffs' side.

14 THE COURT: It wasn't clear to me whether they
15 really had an objection. At least the letter is fairly
16 vague on that score, but I do think you should meet with
17 them and see what the issue is, if there is any issue. Do
18 you want us to set a date today for deadline for
19 objections?

20 MR. GOLDSER: That would be nice. I was thinking
21 two weeks, but probably three is more appropriate.
22 Mr. Saul would prefer two.

23 THE COURT: Let's just set it for April 23rd,
24 which is two and a half weeks or so. That's the start of
25 the week. You will have something to work on on the

1 weekend if they have an objection.

2 MR. GOLDSER: Okay. So that's the status of that
3 proposed order. You know, the rest of the items I think
4 behoove us to have further conversations with the defense
5 on what kind of program we think we can craft. They have
6 submitted to us a proposed order. We have drafted a
7 proposed order, although we have not submitted it, but we
8 have given them this list of items of things that we would
9 like to accomplish in a remand order.

10 That's where I would like to leave that issue
11 today. With the Court's permission and unless the defense
12 has further comments on it, I will stop.

13 MS. VAN STEENBURGH: With respect to the remand
14 order, Your Honor, we do want to keep this part of the
15 litigation moving along, and so we did prepare a suggestion
16 of remand. I've discussed that with Mr. Zimmerman, and
17 we've discussed some other issues.

18 We don't think -- well, actually I have a
19 question about B. We don't know what discovery is to be
20 completed in the MDL, other than the completion of Neil
21 Minton's deposition, and I believe we have some additional
22 documents that we're going to produce from the final
23 collection, but I'm not sure what other discovery
24 Mr. Goldser or the plaintiffs have in mind. I think
25 discovery is done in the MDL.

1 MR. GOLDSER: We've actually gone through and
2 identified a number of different people who are potential
3 deponents that in undertaking our due diligence as co-lead
4 counsel in the PSC for purposes of anybody with a remand
5 case that they might feel that they wanted to have.

6 The list is surprisingly long. We need to go
7 through it to determine whether in fact we want to take all
8 or just some of those. It is in addition to Mr. Minton or
9 Dr. Minton, and there are a couple of categories.

10 I mean, there are the in-house people whose names
11 have surfaced on fairly regular occasion, but there are
12 some outside agencies, some of whom, frankly, had subpoenas
13 issued early on, and we didn't close the loop. The
14 publication house DesignWrite, for example, comes to mind.
15 You remember that name coming up time and again in the
16 trial, and we had subpoenaed them, and we need to follow up
17 with them, but that's an example of one of the things.

18 So those are the categories generally. In our
19 discussions ongoing, it probably makes sense for us to
20 provide a list of deponents and third-party witnesses that
21 we think are important and either decide we're going to do
22 them, argue about them and bring them back to the Court or
23 pull them off the table.

24 MS. VAN STEENBURGH: Well, Your Honor, with
25 respect to that specific item, if they know who those

1 deponents are, maybe they can get us the list. We have our
2 next status conference next month, and we're moving this
3 along. We'll already know who that is, and we can have
4 comments back on that. That would be helpful.

5 THE COURT: Yeah, I think, Mr. Goldser, if you
6 could look at the list, and if there is any paring down and
7 then hand it over to Ms. Van Steenburgh, we can discuss
8 this next month and see where we go.

9 MR. GOLDSER: We'll certainly do that.

10 MS. VAN STEENBURGH: We certainly can discuss
11 some of these other items. We have talked about them.
12 Frankly, on our side issue C, D, F, G and H are either
13 covered by the proposed remand order that we submitted to
14 the Court or we don't think it's really an issue for
15 further discussion. There really isn't anything to
16 discuss.

17 Item E I did want to mention to the Court a
18 couple of things. We have gone through and calculated in
19 terms of the total number of cases that have been filed,
20 the latest number, 1774. I have 1754, so there is a 20
21 plaintiff gap, and those may be recently filed cases, but
22 it looks as though there are 344 cases to remand straight
23 off.

24 Those would be cases that were transferred from
25 other jurisdictions to this court for purposes of discovery

1 and then would be set to be remanded to their original
2 courts. There are I believe 38 Minnesota
3 resident/Minnesota filed cases. Those are going to be with
4 you forever. Those are going to be with you no matter
5 what, and there will have to be a disposition one way or
6 the other in this court.

7 There are 1,372 cases that were filed in
8 Minnesota but the plaintiff resides somewhere else. So
9 those are going to be forum nonconvenience cases that the
10 Court is going to have to take a look at at some point in
11 time. So the 1404 issue really becomes a big issue, and we
12 don't have to resolve that today, but I wanted to bring
13 that to the Court's attention.

14 One way we might be able to whittle that list
15 down is that there may be several cases that would be
16 barred by the statute of limitations. So it might be
17 appropriate to do a limited discovery to determine whether
18 that would be something that the Court would like to
19 entertain as a motion before it would do anything in terms
20 of transfer, but that is on the horizon and something
21 you're going to have to unfortunately deal with, because
22 there is a large number of those cases that are coming up.

23 With respect to the Schedin case, I'm not sure
24 that the Court has to wait until the Eighth Circuit makes a
25 decision one way or the other in terms of remands.

1 THE COURT: So briefing is done. Oral argument
2 is not set yet?

3 MS. VAN STEENBURGH: Right. The Court has issued
4 an order indicating that it will be set, but it has not
5 indicated the date upon which it will be set, and I believe
6 that oral argument has been requested by both sides. So it
7 won't be decided -- although did they reserve something in
8 there about deciding it on just the briefs? I'm not sure,
9 but I think oral argument has been requested by each side
10 in that case.

11 And then we do have, as long as we're talking
12 about Schedin, item number 4. We have been in
13 conversations with opposing counsel about a briefing
14 schedule for the Rule 60 motion and have agreed with the
15 Court's consent to have their response due on April 23rd.
16 And we haven't negotiated a date for reply, but we won't
17 need more than a couple of weeks I think for that, and then
18 we will have to set up a hearing for the Court on that.

19 But I think in anticipation that something is
20 going to happen in terms of setting a date in the Eighth
21 Circuit and the upcoming motion, a lot of these other
22 things can be put into place even if the Court decides to
23 wait so that we have everything ready to go on a remand
24 basis, the forum nonconvenience and also getting going on
25 discovery with respect to the other cases that are still in

1 Minnesota and will remain here.

2 Half of the 38 cases are cases that the Zimmerman
3 Reed and Lewis Saul firms have, and the other half seem to
4 be cases that belong to other attorneys in different
5 mixtures. So that is kind of how that shapes up in terms
6 of the Minnesota cases.

7 THE COURT: We had at one point in time talked
8 about the list from which a next trial, plaintiffs might be
9 selected. What's the status of that list right now? Is it
10 the entire 38 or --

11 MS. VAN STEENBURGH: No. I had asked in my
12 meeting with Mr. Zimmerman, and I talked to Mr. Goldser
13 previously about this, that we would select down from that
14 list, take a look at those cases and make a determination
15 in terms of how many from there to do further discovery and
16 then from there pick any next cases for trial.

17 And we have not narrowed that list down, but we
18 have agreed that there is a pending order out there that
19 requires us to do that, so that is something we need to
20 finish up.

21 MR. SOFFEY: May I interpose an inquiry? I have
22 a question.

23 THE COURT: Go right ahead.

24 MR. SOFFEY: Would I be premature if I served
25 interrogatories now and if I moved for depositions of my

1 experts?

2 THE COURT: Well, which cases are you referring
3 to?

4 MR. SOFFEY: I have two cases. Both of the
5 plaintiffs are named Bouse.

6 THE COURT: Could you spell that?

7 MR. SOFFEY: B-o-u-s-e.

8 THE COURT: B-o-u-s-e?

9 MR. SOFFEY: The case that we're discussing now
10 is Wendy Bouse.

11 THE COURT: Okay. Anyone --

12 MS. VAN STEENBURGH: I might be able to shed a
13 little light on that. Mr. Soffey, I believe you're from
14 New York, are you not?

15 MR. SOFFEY: Yes.

16 MS. VAN STEENBURGH: I believe both of those
17 cases were transferred into the MDL, so they have not been
18 remanded yet. So they remain pending in the MDL for
19 purposes of discovery, if that's of any assistance to the
20 Court on that.

21 MR. SOFFEY: So I can proceed with discovery at
22 this point, or should I hold it in abeyance?

23 THE COURT: Well, you can. I mean, you certainly
24 have a right to. The defense will then respond as they see
25 fit, and we'll handle it as we see fit here. Those cases

1 were moved into this court for purposes of discovery, and
2 discovery is still open on these matters, of course, so you
3 can do that.

4 The defense will file whatever response, if
5 necessary, and then we'll take it from there.

6 MR. SOFFEY: All right. So what I'm talking
7 about is serving interrogatories and taking depositions of
8 physicians here in this jurisdiction and experts.

9 THE COURT: Okay. Just keep in mind that there
10 is a body of evidence and depositions of experts in the
11 case, the case, the overall MDL, that might be helpful to
12 you.

13 MR. SOFFEY: All right. Very good.

14 THE COURT: All right. Thank you.

15 MR. SOFFEY: Then I can hold that in abeyance,
16 right?

17 THE COURT: Sure.

18 Okay. Mr. Zimmerman?

19 MR. ZIMMERMAN: Yes, Your Honor. Thank you. Let
20 me see if I can provide a little bit of overview of where
21 I'm coming from with regard to the remand process generally
22 and the bellwether process and what we're trying to achieve
23 as an MDL so that we don't kind of put the cart before the
24 horse.

25 Number one, we think the bellwether process is

1 over. It's served its purpose. The bellwethering has sort
2 of done what it is supposed to do. It has told people
3 about the cases, showed us a lot of what the evidence will
4 be scientifically, causation and on the facts. I don't see
5 bellwether process to provide any more function to us as a
6 PSC and as an MDL court.

7 I don't know if defendants disagree on that or
8 not, but that's certainly our position, that if we're
9 talking about what the purpose of bellwethering is, we have
10 completed that purpose, and that purpose has been
11 accomplished, and we've got the information that we're
12 going to get.

13 The conclusions we may draw from it, how we
14 extrapolate what we need to extrapolate, that's a different
15 story. We each can take with it what we like, but that's
16 how we feel about bellwether.

17 With regard to the body of MDL work, which you
18 just addressed and needs to be addressed, now it's
19 incumbent upon us if we don't have a settlement or if we
20 don't have a global settlement or if the settlement doesn't
21 happen, which we don't know, the responsibility of the PSC
22 is to put together this body of work, be it the scientific
23 evidence, be it the factual evidence, be it the discovery,
24 be it rulings and put that together into a body of
25 information available for the cases to be transferred with

1 so that the judge who brings -- who has the case in the
2 next jurisdiction that the case is transferred to out of
3 the transferee court back to the transferor court has this
4 body of rulings, has this body of information, has this
5 scientific data, has whatever they have, quote, in the can
6 or in the trial notebook.

7 We need to get that all together. A lot of that
8 is very dependent upon what the Eighth Circuit is going to
9 rule, of course, in Schedin because some of the law of the
10 case could or could not change. We think it's going to be
11 very important, which is why we think Schedin is going to
12 be important because if Schedin changes things or changes
13 what was admissible or changes what conclusions, we hope --
14 we don't think it will, but we have to deal with whatever
15 it is, which is why Ron said at the beginning some of this
16 may be premature until we know where the Eighth Circuit
17 comes out in Schedin. We don't want to get down a path and
18 then find we have to retreat.

19 But it's our job to put this body of information
20 together, and we need to do that, and then once we do that
21 and there is some discovery we have to complete and some
22 things we have to complete within that, and we're meeting
23 and conferring on these issues, then we will begin to have
24 a schedule or an order for remand, whether you remand them
25 all at the same time or you do them sequentially, whether

1 you do them in groups, however. We'll come up with a plan
2 for that.

3 Here's where I think defendants and plaintiffs
4 have a different view of the world. The Minnesota cases,
5 the 38 Minnesota residents/Minnesota filed cases, they're,
6 they're really not ripe for trial until everything is ready
7 to be remanded. They're no different than any other case
8 because they shouldn't be ahead of the group or behind the
9 group.

10 When the body of evidence, when the body of the
11 trial notebook, if you will, is ready, those cases have the
12 benefit and the burdens of those rulings and that body of
13 information, just like any other case. So we don't want to
14 start individual case discovery in those cases now ahead of
15 all the other cases that are going to be part of the remand
16 program. It makes no sense.

17 Yes, they're in front of Your Honor, and yes,
18 this Court will hear them or resolve them if we don't
19 settle them, but they shouldn't be on any different track
20 than all of the other cases that are going to be remanded.
21 So it doesn't make any sense to do case-specific discovery
22 on those cases until we've got the remand program in place.

23 Now, the Court can decide, well, I'm going to
24 remand my cases first and those later. You can decide to
25 do that or not do that, but we shouldn't just get those out

1 in advance just because they happen to be filed here as
2 opposed to a case for a New York resident, and I think we
3 differ somewhat on that order of things, if I understand
4 what, what Tracy has been telling me.

5 But what's really mostly important is that we sit
6 down together and we have been, and we have been doing it
7 in good faith. We have been, I must say, honestly been
8 putting more time on the settlement than we have on the
9 program of remand at this time to decide what are these
10 common issues, what of this common body of information
11 needs to be put together so we can all agree what it is,
12 what has to be decided by Your Honor before we can do that
13 and what needs to be done in terms of discovery.

14 Then we can put together a remand program that
15 makes sense given all of the, whatever it is, 1400 or 1700
16 cases that ultimately have to be remanded. So to sum up, I
17 think we're done with bellwether. I think the body of MDL
18 work has to be all drawn together. I think we come up with
19 a remand program, and I think the Minnesota cases shouldn't
20 be treated any differently than any other case.

21 THE COURT: Ms. Van Steenburgh?

22 MS. VAN STEENBURGH: I guess I'm a little
23 confused. I don't think that in talking about the 38 cases
24 we were talking about bellwether cases anymore. Those are
25 cases that are here and can proceed to discovery and can be

1 treated like any other case. I don't know why, I'm just a
2 little confused as to why they're considered cases that
3 have to be remanded. It's not like the Court has to remand
4 them to himself.

5 And so it seems like we can move along with those
6 cases, just like we did with the other bellwether cases,
7 and we need to get those cases into discovery because
8 they're going to have to be resolved one way or the other.
9 It's just like there are cases, the Sharon Johnson case is
10 out there, the Douglas Olson case, discovery went on with
11 those cases as well, and we need to finish those.

12 If any of the cases that are before the Court as
13 Minnesota cases are subject to summary judgment, we should
14 be moving along, getting those cases disposed of. So I'm
15 not sure that they need to wait for remand. I'm also even
16 more confused about this issue of the body of the MDL work
17 that the PSC is supposed to put together a package for the
18 Court.

19 I have never seen that done in an MDL before.
20 Maybe they want to put a package together for other
21 plaintiffs' lawyers in other jurisdictions, but the Court's
22 remand order will have a lot of the information, and of
23 course all of the orders that the Court has issued in the
24 MDL or in the bellwether cases will be available to those
25 other judges.

1 So I don't think it is a question of putting a
2 body of MDL work together and putting a package of cases to
3 transfer as a trial notebook. I'm just not familiar with
4 that, and I don't think that's been done to my knowledge as
5 a routine course.

6 So I think that we can move ahead, and what I am
7 a little concerned about is that we're going to be down the
8 road two or three months from now nothing having happened.
9 If things get resolved and they're settled, that's great,
10 but if they aren't, we want to keep moving along because
11 otherwise there are plaintiffs whose cases need to be moved
12 along, and we would like to get things moved along so that
13 we can push this on forward.

14 So I would suggest to the Court that perhaps if
15 we're going to move to work some of these things out, and I
16 have to say the punitive damages issue, the consumer fraud
17 issue, the statute of limitations issue, I put those right
18 in the suggestion of remand order, and I didn't hear
19 anything from the other side. So I'm not sure why they're
20 being raised now.

21 We can talk about those things, and then by next
22 month, they should be resolved so we can get this process
23 going and not have to keep waiting until something happens
24 either in the Eighth Circuit or they put a package together
25 or something like that. So that's our proposal.

1 THE COURT: Well, I certainly don't want to hold
2 matters up here waiting for the circuit because that's
3 unpredictable. The last MDL that I had I waited two years
4 for a decision out of the circuit at one point in time.
5 They may be very quick. It's entirely possible, but it
6 also may be a long delay, and I think that's inconsistent
7 with my responsibilities as an MDL judge to sit and wait
8 for the circuit to reach a decision in Schedin.

9 Ms. Van Steenburgh, do you think that we are done
10 with the bellwether process, or do you think that an
11 additional trial or more would be helpful in this case?
12 What is your thinking on that?

13 MS. VAN STEENBURGH: I was going to talk to
14 Mr. Winter here for a second. I think that when I had --
15 when I was before the Court before, I was of the view that
16 another bellwether case might be appropriate, that there
17 may be another case out there that would be helpful to us.

18 But we're getting some indication from the
19 plaintiffs they think that the -- they can size up the
20 cases, determine value from the cases and understand those
21 cases very well at this point in time. We would not be
22 adverse to another bellwether case, I believe.

23 THE COURT: Well, it seems to me, you know, from
24 my perspective we surely don't need to identify such a case
25 today, but with the schedule the way it is, I would like to

1 set aside time if we are going to do another bellwether
2 trial, and I don't know today whether we're going to or
3 not. It depends on whether both sides agree that it's
4 appropriate to move forward.

5 But from my perspective it would be helpful to
6 have time blocked out on my calendar, otherwise we're
7 getting into longer delays, and we're putting together now
8 the calendar for the fall, and it may make sense to reserve
9 three weeks in case we're ready to go forward with another
10 one, so that would be my intent. Probably sometime in
11 October, just to have a date thrown out for now?

12 Again, that doesn't mean we have to go trial then
13 or whether we'll agree to or there will be anything that is
14 ready, but it would be helpful from my perspective to have
15 the time available. So I'm probably looking at perhaps the
16 8th of October, which is a Monday.

17 MR. GOLDSER: I have plans to be gone through
18 October 15th.

19 THE COURT: So you're back on the 15th?

20 MR. GOLDSER: I think so.

21 THE COURT: That's a Monday. We could move it to
22 the 22nd if that would be better for you, Mr. Goldser?

23 MR. GOLDSER: It certainly would be. Thank you.

24 THE COURT: Okay. Let's just say October 22nd.

25 We will set aside the normal three weeks, and at a later

1 point, we will discuss possibilities for a trial then,
2 whether it's one or two plaintiffs, but it really is quite
3 useful to have the dates set from my perspective.

4 All right. Anything else that we need to talk
5 about today, Mr. Goldser?

6 MR. GOLDSER: The other only other item on the
7 agenda we haven't reached is number 5, the Straka new trial
8 motion, and that's only to talk about dates. Plaintiffs'
9 motion and brief have been filed, and I can't recall when
10 your response is due, if we have a date even picked out for
11 that.

12 MS. VAN STEENBURGH: We do. It's coming up. I
13 know that somebody in my office is working on it, so it
14 must be soon.

15 THE COURT: It's not at the top of your mind
16 there?

17 MS. VAN STEENBURGH: That's right. No.

18 MR. GOLDSER: That's where we are. The response
19 is due sometime soon.

20 MS. VAN STEENBURGH: Yes.

21 THE COURT: And reply, so you want a date
22 sometime later in May, perhaps?

23 MR. GOLDSER: Probably.

24 THE COURT: We'll find a date, and Ms. McLelland
25 will get back to you with a date and time for that

1 argument. All right.

2 MR. GOLDSER: Otherwise, I believe that covers
3 the agenda.

4 THE COURT: Okay.

5 MS. VAN STEENBURGH: What we would like to do is
6 set another date for a status conference.

7 THE COURT: Yeah, let's do that.

8 MS. VAN STEENBURGH: Okay.

9 THE COURT: Probably May 14th or 15th. That
10 looks pretty good for my calendar.

11 MR. SOFFEY: I know I'm in trial on both those
12 days.

13 THE COURT: We'll make sure you can be on the
14 phone.

15 I'm sorry. Mr. Zimmerman?

16 MR. ZIMMERMAN: If I get a choice, the 14th would
17 be better for me than the 15th. That's a Monday.

18 THE COURT: We're anticipating starting a trial
19 that day, but there is no reason not to set aside time in
20 the afternoon on the 14th if that's okay.

21 MS. VAN STEENBURGH: Actually, Your Honor, it
22 would be better on the 15th.

23 Is it just impossible?

24 MR. ZIMMERMAN: I'm checking right here. It
25 would be in the afternoon, did you say?

1 THE COURT: Which day?

2 MR. ZIMMERMAN: The 14th I'm wide open. The 15th
3 I can't do it in the afternoon.

4 THE COURT: We probably could do it in the
5 morning. We've got a trial set that week that's a backup.
6 It's a trial that is set for two weeks from now, but it's
7 the second trial, and the first one looks like it's going.
8 So I'm holding those days for a trial. That's fine. We
9 could do it in the morning on the 15th.

10 MS. VAN STEENBURGH: That would be better for me.

11 MR. SOFFEY: What time would that be?

12 THE COURT: Nine o'clock on the 15th.

13 MS. VAN STEENBURGH: That would be great. Thank
14 you.

15 MR. GOLDSER: My only caveat and suggestion would
16 be, Your Honor, if we do set a further date for a
17 conference with Judge Boylan that we can merge the two
18 conferences, and if that happens, we will so let you know
19 and maybe move the status conference around.

20 THE COURT: That's fine. All right. Anything
21 else for today?

22 MS. VAN STEENBURGH: Nothing, Your Honor.

23 MR. GOLDSER: No, Your Honor.

24 THE COURT: Okay. Very well. Thank you,
25 everyone.

1 MR. SOFFEY: Thank you.

2 THE COURT: We will be in recess, and we will
3 look forward to seeing you in a month's time. The Court is
4 in recess.

5 MS. VAN STEENBURGH: Thank you.

6 MR. GOLDSER: Thank you, Your Honor.

7 * * *

8 I, Kristine Mousseau, certify that the foregoing
9 is a correct transcript from the record of proceedings in
10 the above-entitled matter.

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14 Certified by: s/ Kristine Mousseau, CRR-RPR
15 Kristine Mousseau, CRR-RPR

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